LOOI WAN TEIK

v.

DIJAYA ENTERPRISE BHD

HIGH COURT MALAYA, KUALA LUMPUR
KC VOHRAH J
[CIVIL APPEAL NO: R1-12-367-98]
22 JANUARY 2001

CIVIL PROCEDURE: *Appeal - Record of appeal - Application to file supplementary record of appeal - To include documents omitted from original record of appeal - Whether application within jurisdiction of High Court - Whether application by way of summons in chambers correct procedure - Whether omission to file documents with good reason*

The deputy registrar allowed the application by the appellant by way of summons in chambers for an extension of time to file a supplementary record of appeal to include documents which had not been included in the original record of appeal. The respondent appealed against that decision on the grounds that: (i) the application should not have been filed before the High Court but in the Sessions Court where the appeal arose; (ii) the application should have been made by a notice of motion, as there was no rule in the Rules of the High Court 1980 providing for an application for leave to extend time or to file a supplementary record; and (iii) no proper reason was given as to why the original record did not contain the missing documents and as such leave should have been refused.

Held:

[1] There was no good reason why the application to file a supplemental record could not be heard in the High Court. The fact that such rules prescribing the procedure for its exercise had not been provided did not oust the jurisdiction of the High Court.

[2] Whether the application was by notice of motion or by way of summons in chambers was hardly important so long as both parties in the application and the affidavits relied upon herein were before the court.

[3] There must be a good reason to show why the extension of time should be granted, *ie*, why there was an omission to file the relevant documents in the original record of appeal. That reason was not supplied and accordingly the application should have been dismissed by the deputy registrar.

[Appeal allowed.]

Case(s) referred to:
Lee Lan v. Lim Yoon Loy & Ors [1991] 3 CLJ 2393 ***(refd)***
Soon Huat Construction Sdn Bhd v. Kiong Siang Construction Sdn Bhd [1999] 3 CLJ 778 ***(refd)***
Tan Lee Hong v. Letchmee [1994] 2 CLJ 570 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 25(2)
Subordinate Courts Rules 1980, O. 49 r. 2(5)(b)

For the appellant - Looi Pek Hong; M/s PH Looi & Co
For the respondent - Philip Chai; M/s Soo Thien Ming & Nasrah

Reported by Suresh Nathan

JUDGMENT

KC Vohrah J:

Decision

This is an appeal against the decision of the deputy registrar who allowed the application by the appellant in this case for extension of time to file a supplemental record of appeal to include documents which had not been included in the original record of appeal.

The application made before the deputy registrar was by way of summons in chambers. The respondent argues that the application, if at all an application of such nature could be made to the High Court, should have been made by notice of motion.

The respondent also argues before me that in any event no proper reason was given as to why the original record did not contain the missing documents and as such leave should have been refused.

There is an important argument advanced which needs to be considered. It is this – that the application should not have been filed in the High Court but in the Sessions Court from which the appeal arises as there is no rule in the Rules of the High Court 1980 (the RHC) providing for an application for leave to extend time or to file a supplementary record. The learned counsel for the respondent relies on the case of *Soon Huat Construction Sdn Bhd v. Kiong Siang Construction Sdn Bhd* [1999] 3 CLJ 778 for his argument to say that the application should have been made under the Rules of the Subordinate Courts 1980 (the SCR) before the Sessions Court.

In that case there was an appeal from the decision of the Sessions Court Judge where she had dismissed an application for extension of time to file a record of appeal to the High Court. One of the issues raised was whether the Sessions

Court is the proper court to which an application for an extension of time to file the record of appeal in the High Court is made.

For a better appreciation of the matters of principle involved arguments for and against the view that the Sessions Court has jurisdiction to entertain application for extension of time Ian Chin J's treatment of the matters is very helpful (at 780 and 781),

> The sessions court judge was of the view that she had the jurisdiction to grant an extension of time to file the record of appeal in the High Court since, according to her, O. 49 r. 6(3) of the Subordinate Courts Rules 1980 ('the SCR') prescribes the time within which the record of appeal is to be filed in the High Court and O. 3 r. 5 of the SCR allows an extension of time for doing any act required by the SCR. She also relied on *Lee Lan v. Lim Yoon Loy & Ors* [1991] 3 MLJ 419 (SC). The case concerns the service of a notice of appeal and the Supreme Court there held at p. 422 that: 'As the time prescribed for the filing and service of the notice of appeal 'is required or authorized by these rules', ie SCR O. 49, it follows that the proper forum to apply for extension of time is the court appealed from'. The Supreme Court also held that though an application could also be made to the High Court which has jurisdiction to entertain such a application under item 8 of the Schedule to the Courts of Judicature Act 1964, the application should in the first instance be made to the lower court. Though that case concerns a notice of appeal, and not a record of appeal, it is nevertheless relevant because the decision turns on the interpretation of O. 3 r. 5 of the SCR with which the present case is also concerned. The Supreme Court there was of the view that since the time for service of the notice of appeal was prescribed by the then O. 49 r. 2, it, thus, came within the ambit of O. 3 r. 5, since the service of a notice of appeal is the doing of an act within a prescribed time, prescribed under the SCR.

Then, relying on the Supreme Court case of *Lee*, Ian Chin J continued and asked two questions. The first question is whether the filing of the record is an act within a certain time prescribed the SCR:

> Applying the same approach as done in that case, the first question to ask is whether the filing of the record of appeal is an act within a certain time prescribed the SCR. The answer is yes and it is provided by O. 49 r. 6(3) of the SCR which was only introduced in 1993. Since it is an act required by the SCR, it is within the ambit of O. 3 r. 5(1) and thus the sessions court has jurisdiction to extend the time. Mr. Allan Lao, learned counsel for the respondent, argued that because the notice of appeal was already lodged with the High Court and the High Court had consequently registered the appeal the High Court was seized of jurisdiction over the matter. Consequently the lower court has no jurisdiction. That argument calls for answers to many questions. One of which is why there is no provision made in the Rules of the High Court 1980 (RHC) as to the time for the filing of the record of appeal?

The second question posed by Ian Chin J is this – why was the amendment made to the SCR and not to the RHC providing for the time to file the record:

> The second question is why was the amendment made to the SCR providing for the time to file the record of appeal and not to the RHC if it was intended to exclude the lower court from having the jurisdiction to extend time. From those facts, it can be concluded that the legislature had intended that the lower court should have jurisdiction to extend the time for the filing of the record of appeal in the High Court; especially so, when the amendment to the SCR providing for the filing of the record of appeal came after, though not necessarily because of, the decision of *Lee Lan v. Lim Yoon Loy & Ors.*
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> Furthermore, since the time for filing of the record of appeal is not prescribed by the RHC, the High Court's jurisdiction which it has concurrently with the lower court, would come not by virtue of O. 3 of the RHC but by virtue of item 8 to the Schedule of the Courts of Judicature Act 1964 as decided in *Lee Lan v. Lim Yoon Loy & Ors.*

The learned judge concluded that the judge of the sessions court was right in her decision that she has jurisdiction to hear an application for the extension of time to file the record of appeal in the High Court. But clear in his judgment is that the right of the sessions court is **concurrent** with that of the High Court by virtue of item 8 in the schedule to the Courts of Judicature Act 1964 as was decided in the Supreme Court of *Lee Lan v. Lim Yoon Loy & Ors.*

There appears, however, to be a decided case to say that resort cannot be had to item (or paragraph) 8 of the schedule to the Courts of Judicature Act 1964.

In *Tan Lee Hong v. Letchmee* [1994] 2 CLJ 570 the facts disclose that the appellant had applied to the High Court for an order that leave be given to the appellant to lodge RM250 as prescribed in the SCR as security for the costs of the appeal from the Sessions Court to the High Court outside the 14-day limit specified. The High Court dismissed the application in the High Court for enlargement of time, holding that the exercise of the additional powers of the High Court under s. 25(2) of the Courts of Judicature Act 1964 and para. 8 of the schedule to the Act to enlarge or abridge the time prescribed by any written law for doing any act or taking any proceeding is subject to the proviso to s. 25(2), which states that all such powers shall be exercised in accordance with any written law or rules of court relating to the same. The SCR fall within the meaning of written law in that proviso and, as O. 49 r. 2(5)(b) specifically provides for such an application to be made to the court appealed from, the High Court lacked the power and jurisdiction to hear the application herein.

Section 25(2) reads as follows:

> (1) ...
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> (2) Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule:
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> **Provided that all such powers shall be exercised in accordance with any written law or rules of court relating to the same**. (emphasis added).

What is to be noted is that para. 8 of the Schedule to the Act has given power to the High Court to enlarge or abridge the time prescribed by any written law for doing any act or taking any proceeding. That power has to be exercised "in accordance with any written law or rules of court relating to the same." There is no doubt the High Court has power to enlarge time. The manner the power has to be exercised is subject to written law or rules and as it stands no written law or rules have expressly prescribed the procedure for its exercise. The fact that such rules have not been provided does not oust the jurisdiction of the High Court.

It is important to note that before the High Court there is an appeal which was properly filed, *ie*, Civil Appeal No. R1-12-367-98. The High Court is seised of the application and I can see no good reason why when the appeal record is before the High Court the application to file a supplemental record cannot be heard in the High Court since in any event the appeal proper is to be heard by the High Court.

Having said that, whether the application is by motion or summons-in-chambers is hardly important so long as both parties in the application and the affidavits relied upon by both are before the court and in any event the RHC is silent on the procedure.

However, for an extension of time to succeed there must be good reason to show why the extension of time should be granted, *ie*, why there was an omission to file their documents and that reason was not supplied and accordingly the application should have been dismissed by the deputy registrar.

The appeal against the decision of deputy registrar is allowed with costs.